No. 15006

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as Secretary of State,

Appellant,

vs.

QUAN YOKE FONG,

Appellee.

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC.

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Grounds.

Appellant-petitioner, John Foster Dulles, as Secretary of State, respectfully petitions this Honorable Court for a rehearing of this appeal, and further petitions for a rehearing of this appeal en banc on the following grounds:

I.

The decision of this Court, if unchanged, will result in a serious miscarriage of justice, and therefore merits the consideration of the Court's entire panel.

II.

The reasoning of the majority in upholding the lower court's denial of appellant's motions is based upon an erroneous premise; since the use as evidence of the blood tests made of appellee's parents would result in no legal

wrong to appellee, and since no consideration was given by this Court to the blood tests made of appellee's parents in 1952.

III.

The majority opinion failed to consider appellant's contention that the District Court erroneously prevented appellant from presenting or offering any evidence that appellee's blood was incompatible with that of his alleged parents.

IV.

The ruling of this Court that the delay involved in processing appellee's passport application served to confer jurisdiction upon the District Court is unsound.

I.

The Decision of This Court, if Unchanged, Will Result in a Serious Miscarriage of Justice, and Therefore Merits the Consideration of the Court's Entire Panel.

According to blood tests made of appellee and his alleged parents, appellee's claim to citizenship of the United States is patently fraudulent. *These blood tests show that it is impossible for appellee to be the child of his alleged father, and consequently that it is impossible for appellee to be a citizen of the United States.*

Blood tests were made of appellee and his alleged parents upon two separate occasions, in 1952 and in 1955. The results of both groups of tests are identical. They both show that appellee cannot be the child of his pur-

ported father. Appellee, who was found to have group "O" cannot be the child of Quan Lun Hong, who has blood of group "AB." This is established by the most advanced medical authority [Medico-legal Application of Blood Grouping Tests," The Journal of the American Medical Association, June 14, 1952, Vol. 149, pp. 699-706], as well as by the Affidavit of Dr. Michael A. Rubinstein, contained in the record [R. 47-48].[1] Nevertheless, the Court below, by its judgment declared appellant to be a national and citizen of the United States, and this Court affirmed. The affirmance by this Court, if allowed to stand, will result in a serious miscarriage of justice, and will undoubtedly encourage the presentation of false claims to citizenship.

The present appeal, therefore, merits the consideration of the entire panel of this Court. Appellant recognizes that the "right to citizenship is a priceless thing" [*Wong Wing Foo v. McGrath,* 196 F. 2d 120, 122 (C. A. 9, 1952)]; and when a bona fide claim to citizenship is presented, the court should be vigilant to insure that it receives judicial recognition. But where, as in the case at bar, a claim which is patently fraudulent appears, the court should exercise equal vigilance to guard against imposition. All members of this Court, therefore, should consider this appeal, in order to determine whether one who, according to blood tests, cannot be a citizen of the United States, may nevertheless be judicially so adjudged.

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[1]"R" refers to Transcript of Record.

II.

The Reasoning of the Majority in Upholding the Lower Court's Denial of Appellant's Motions Is Erroneous.

A. The Results of the Blood Tests Made of Appellee's Parents During 1955 Were Admissible.

The majority seems to proceed upon the premise that since the blood tests made of appellee's parents on June 9, 1955 were pursuant to an order of court, the results of such tests were not admissible in evidence. Its Opinion states (p. 4 of Slip Opinion):

> "* * * It was a *legal wrong to Fong* for the court to go outside its jurisdiction and compel his parents to give evidence against him." [Emphasis added.]

The majority then went on to say (p. 4):

> "In view of the fact that the father's affidavit states that his and his wife's blood was given under the compulsion of the court's order so made without its jurisdiction, *it would be futile to grant any motion to take the blood of Fong for comparison with theirs.* * * *" [Emphasis added.]

The above reasoning is at variance with the well-established rule of law that in the absence of some *valid constitutional objection,* all relevant evidence will be considered by the Court, no matter how obtained. [*Olmstead v. United States,* 277 U. S. 438, 466-469 (1927); *Joong Sui Noon v. United States,* 76 F. 2d 249 (C. A. 8, 1935); *United States v. Lee Hee,* 60 F. 2d 924 (C. C. A. 2, 1932); *United States v. Wainer,* 49 F. 2d 789 (W. D. Pa., 1931); *In re Dooley,* 42 F. 2d 562 (S. D. N. Y., 1930).]

Appellee's parents were deprived of no constitutional right. Their blood was tested pursuant to court order

on June 9, 1955. The subsequent decision of this Court in *Fong Sik Leung v. Dulles,* 226 F. 2d 74 (C. A. 9, 1955), holding that Rule 35, Federal Rules of Civil Procedure did not authorize such an order, did not render the blood testing of appellee's parents unconstitutional. [For a further discussion of constitutionality, see p. 7 of Appellant's Reply Brief.]

Moreover, even if it be assumed that the constitutional rights of appellee's parents were violated, appellant cannot complain. Only the person whose constitutional rights have been violated is in a position to complain. [*Gibson v. United States,* 149 F. 2d 381, 384 (C. A. Dist. Col., 1945), cert. den. 326 U. S. 724; *Ingram v. United States,* 113 F. 2d 966, 967 (C. C. A. 9, 1940); *Lewis v. United States,* 6 F. 2d 222 (C. C. A. 9, 1925). See also: *Goldstein v. United States,* 316 U. S. 114 (1942); *Jeffers v. United States,* 187 F. 2d 498 (C. A. Dist. Col., 1950), affirmed 342 U. S. 48; *Shields v. United States,* 26 F. 2d 993, 996 (C. A. Dist. Col., 1928); *Kelleher v. United States,* 35 F. 2d 877, 879 (C. A. Dist. Col., 1929); *Morgan v. Halberstadt,* 60 Fed. 592 (C. C. A. 2, 1894), cert. den. 154 U. S. 511; see page 8 of Appellant's Reply Brief for a more detailed discussion of the cases cited above.]

Fong Sik Leung v. Dulles, supra, is distinguishable. In that case complete blood tests of appellant and his parents were not available, since Fong Sik Leung refused to submit to a test. Consequently, the issue of whether the results of a test of Fong Sik Leung would have been admissible did not arise. In the case at bar, *complete blood tests are available of both appellee and his purported parents, showing that appellee cannot be the son of his alleged father.* If appellee's supposed par-

ents felt that submitting to a blood test violated their right to be free from restraint or interference, they could have refused to submit to a blood test, as was done in *Fong Sik Leung.* Thereafter, the propriety of their refusal could have been judicially determined during preliminary proceedings, enabling the defendant, if necessary, to present other available evidence of the blood types of appellee's parents. His parents having submitted to blood tests, however, *appellee cannot take advantage of a supposed wrong to his parents in order to judicially establish a right to citizenship to which he is not entitled.* Appellee's parents are not parties to this action [*Fong Sik Leung v. Dulles, supra*]; consequently *the rights of appellee and those of his alleged parents cannot be treated as identical.*

B. The Majority Failed to Consider the Blood Tests Made of Appellee's Parents During 1952.

The majority opinion omits any reference to the blood tests made of appellee's parents during 1952. On September 24, 1952, appellee's parents voluntarily submitted to blood tests conducted by the West Coast Medical Laboratories. The results of these tests were identical with the tests made in 1955. [Compare reports dated September 24, 1952 contained in the passport file relating to appellee, Exhibit "A", with the results of the 1955 tests as disclosed by the Affidavit of Albert L. Blifeld (R. 45-47).] As is more fully discussed in Appellant's Opening Brief [pp. 23-24], the 1952 blood tests of appellee's parents are available, and it is unnecessary to rely upon the 1955 tests. Thus, for an additional reason, the statement in the majority opinion that "it would be futile to grant any motion to take the blood of Fong for comparison" is unsound.

III.

The Majority Opinion Failed to Consider Appellant's Contention That the District Court Erroneously Prevented Appellant From Presenting or Offering Any Evidence That Appellee's Blood Was Incompatible With That of His Alleged Parents.

This contention of appellant is discussed in full at pages 22 through 26 of its Opening Brief; however, the majority opinion makes no reference to it. When the hearing of June 1, 1956 was calendared, *it was the understanding of both counsel and the District Court that the hearing was to constitute only a partial trial* in order to obtain the testimony of appellee's mother before her departure to Hong Kong [R. 61-63]. Since it was clearly understood that the hearing of June 1, 1956 would constitute only a partial trial, appellant made no effort at that time to offer the evidence then available to show that appellee's blood was incompatible with that of his alleged parents. When the hearing of June 1, 1955 was concluded, *the Court made it clear that the case was not yet submitted; that a further hearing would be held; and that decision would be held in abeyance until blood tests were received* [R. 139, 140, 143, 145]. At no time did appellant either open or rest his case.

Yet on August 16, 1955, the Trial Court, without a further hearing, denied appellant's motion for a supplemental order to require appellee to furnish a blood sample, which had been made on July 1, 1955, and ordered judgment for appellee. The Court refused to continue the matter to allow appellant to present evidence of the re-

sults of blood tests of appellee and his alleged parents, and further refused to permit appellant to make an offer of proof as to such evidence [R. 147-148].

The District Court by its action erroneously prevented appellant from presenting or offering *any* evidence to show that appellee's blood was incompatible with that of his alleged parents. *Refusal to allow a party to present his defense deprives of a fair hearing and constitutes reversible error.* [*Republic National Bank v. Crippen,* 224 F. 2d 565 (C. A. 5, 1955); *L. B. Wilson, Incorporated v. Federal Communications Commission,* 170 F. 2d 793 (C. A. Dist. Col., 1948).]

IV.

The Ruling of This Court That the Delay Involved in Processing Appellee's Passport Application Served to Confer Jurisdiction Upon the District Court Is Unsound.

The majority opinion, after noting that appellee's passport application was filed on May 13, 1952, declared that: "Nothing was done in this over-seven-month period . . ." This statement is not supported by the record. The passport file relating to appellee [Exhibit A] discloses that on July 21, 1952, the American Consulate General requested the District Director, Immigration and Naturalization Service, Los Angeles, California, to blood-test appellee's alleged parents, and that on September 24, 1952 they submitted to blood tests conducted by West Coast Medical Laboratories; that on October 21, 1952, appellee himself was blood-tested by Dr. Eric Vio in Hong

Kong, B. C. C.; and that on October 28, 1952, appellee was interviewed. Since this Court's decision was undoubtedly based upon the erroneous premise that "nothing was done" during the period of delay, the jurisdictional issue merits reconsideration.

Congress manifested an intent that an administrative determination of United States nationality and/or citizenship should precede the issuance of a passport [see discussion on pp. 10-11 of Appellant's Opening Brief]. Therefore, appellee, when he filed his passport application did not acquire an immediate "right" to the issuance of a passport; nor did he acquire an immediate "right" to a determination of his claim to citizenship. *He was only entitled to have his claim processed in accordance with normal administrative procedures, considering all the facts and circumstances of the case.* From the administrative steps described above, it appears that appellee was accorded this right.

The majority opinion assumes, appellant believes erroneously, that additional funds would have eliminated the congestion of the administrative calendar at the American Consulate at Hong Kong. However, the unavailability of qualified personnel, insufficient housing for office space and personnel, and the necessity, due to the claimants' place of birth and prior residence, to verify their nationality status through other than official sources, are factors which, even though funds were unlimited, would have delayed elimination of congestion [pp. 5-6, Exhibit B].

Conclusion.

It is respectfully submitted that the decision in this case, if allowed to stand, will result in a grave miscarriage of justice. One who according to blood tests cannot be the son of his purported father, and thus cannot be a citizen of the United States, will have been judicially declared a citizen. Fraudulent claims to citizenship will thereby be encouraged and the ends of justice thwarted.

Wherefore, it is respectfully submitted that only by granting a rehearing before the entire panel of this Court can justice be done.

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Chief of Civil Division,

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Attorneys for Appellant.

Certificate of Counsel.

I, JAMES R. DOOLEY, one of the counsel for Petitioner in the above entitled action, hereby certify that the foregoing Petition for Rehearing and Petition for Rehearing En Banc is presented in good faith and not for delay, and in my opinion is well-founded in law and in fact, and proper to be filed herein.

JAMES R. DOOLEY,

Assistant U. S. Attorney.